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In the Supreme Court of the United States

OCTOBER TERM, 1988

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Office of Personnel Management can be equitably estopped from applying the requirements of 5 U.S.C. 8337(d), which mandate discontinuance of a disability annuity when the annuitant's earned income exceeds the maximum amount allowed under the statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	24
Appendix A	1a
Appendix B	20a
Appendix C	25a
Appendix D	30a
Appendix E	31a
Appendix F	32a

TABLE OF AUTHORITIES

Cases:

Akbarin v. *INS*, 669 F.2d 839 (1st Cir. 1982) 19, 22
ATC Petroleum, Inc. v. *Sanders*, 860 F.2d 1104 (D.C. Cir. 1988) 20
Automobile Club v. *Commissioner*, 353 U.S. 180 (1957) 8, 13, 17
Azar v. *United States Postal Service*, 777 F.2d 1265 (7th Cir. 1985) 23
Best v. *Stetson*, 691 F.2d 42 (1st Cir. 1982) 22
Chien-Shih Wang v. *Attorney General*, 823 F.2d 1273 (8th Cir. 1987) 22
Corniel-Rodriguez v. *INS*, 532 F.2d 301 (2d Cir. 1976) ... 22, 23
Costello v. *United States*, 365 U.S. 265 (1961) 9
County of Boulder v. *United States*, 108 S. Ct. 1762 (1988) 21
Crown v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1988) 13, 14, 23
Deltona Corp. v. *Alexander*, 682 F.2d 888 (11th Cir. 1982) 20
Dorl v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974) 13, 19

Cases—Continued: Page

Edgewater Hospital v. *Bowen*, 857 F.2d 1123 (7th Cir. 1988) 22
Emery Mining Corp. v. *Secretary of Labor*, 744 F.2d 1411 (10th Cir. 1984) 14, 21
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) ... 8, 9, 11, 12, 20
Federal Deposit Insur. Corp. v. *Harrison*, 735 F.2d 408 (11th Cir. 1984) 20
GAO v. *GAO Personnel Appeals Board*, 698 F.2d 516 (1983) 20
George v. *Railroad Retirement Board*, 738 F.2d 1233 (11th Cir. 1984) 20
Gibbons v. *United States*, 75 U.S. (8 Wall.) 269 (1868) ... 8
Goldberg v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976) 14, 22
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 9
Hansen v. *Harris*, 619 F.2d 942 (2d Cir. 1980) rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981) 10
Hart v. *United States*, 95 U.S. 316 (1877) 8
Heckler v. *Community Health Services*, 467 U.S. 51 (1984) ..... *passim*
Home Savings & Loan v. *Nimmo*, 742 U.S. 585 (10th Cir. 1984) 19
INS v. *Hibi*, 414 U.S. 5 (1973) 8, 13, 17, 18
INS v. *Miranda*, 459 U.S. 14 (1982) 8, 11, 13, 18
INS v. *Pangilinan*, 108 S. Ct. 2210 (1988) 9, 10
Larson, In re of, 862 F.2d 112 (7th Cir. 1988) 14, 23
Lee v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) 8, 13
Leimbach v. *Califano*, 596 F.2d 300 (8th Cir. 1979) 21
Lyden v. *Howerton*, 783 F.2d 1554 (8th Cir. 1986) 21
Montana v. *Kennedy*, 366 U.S. 308 (1961) 8, 18
Morgan v. *Heckler*, 779 F.2d 544 (9th Cir. 1985) 21
Moser v. *United States*, 341 U.S. 41 (1951) 8
Mukherjee v. *INS*, 793 F.2d 1006 (9th Cir. 1986) 21
Phelps v. *Federal Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986) 22
Pine River Logging Co. v. *United States*, 186 U.S. 279 (1902) 8

Cases—Continued: Page

Portmann v. *United States*, 674 F.2d 1155 (7th Cir. 1982) 22, 23
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 6, 8, 10, 11
Scime v. *Bowen*, 822 F.2d 7 (2d Cir. 1987) 13, 18, 19, 22, 23
Sutton v. *United States*, 256 U.S. 575 (1921) 8
United States v. *Browning*, 630 F.2d 694 (10th Cir. 1980), cert. denied, 451 U.S. 988 (1981) 14, 21
United States v. *Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966) 23
United States v. *Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) 9
United States v. *Killough*, 848 F.2d 1523 (11th Cir. 1988) 13, 19, 20
United States v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720 (1824) 10
United States v. *Manning*, 787 F.2d 431 (8th Cir. 1986) .. 22
United States v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) 8
United States v. *San Francisco*, 310 U.S. 16 (1940) 13, 17
United States v. *Stewart*, 311 U.S. 60 (1940) 8
United States v. *Vonderau*, 837 F.2d 1540 (11th Cir. 1988) 20
United States v. *Wingfield*, 822 F.2d 1466 (10th Cir. 1987) 21
Utah v. *United States*, 284 U.S. 534 (1932) 8
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 8, 9
Wagner v. *Director, Federal Emergency Management Agency*, 847 F.2d 515 (9th Cir. 1988) 6, 8
Watkins v. *United States Army*, No. 85-4006 (May 13, 1989) 21
Wilber Nat'l Bank v. *United States*, 294 U.S. 120 (1935) .. 8
Zimmermann v. *Heckler*, 774 F.2d 615 (4th Cir. 1985) ... 22

Constitution and statutes:

U.S. Const. Art. 1, § 9, Cl. 7 10
Federal Tort Claims Act, 28 U.S.C. 2680(h) 10

Statutes – Continued:	Page
Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 302(a)(1), 96 Stat. 792	3
5 U.S.C. 8337(a) (Supp. IV 1986)	3
5 U.S.C. 8337(d) (1976 ed.)	3
5 U.S.C. 8337(d)	2, 4, 7, 11, 15
28 U.S.C. 1295(a)(2)	23
28 U.S.C. 1295(a)(9)	5, 23
28 U.S.C. 1295(a)(10)	23
Miscellaneous:	
Federal Personnel Manual Letter No. 831-64 (1981)	4, 5
J. Pomeroy, *Equity Jurisprudence* (S. Symons ed. 1941)	12

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v.

CHARLES RICHMOND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Office of Personnel Management, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 862 F.2d 294. The decision of the Merit Systems Protection Board's administrative judge (App., *infra*, 20a-24a) and the denial of review by the Board (App., *infra*, 32a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 30a) was entered on December 2, 1988. A timely petition for rehearing was denied on February 3, 1989 (App., *infra*, 31a). On April 25, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding June 3, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8337(d) of Title 5, United States Code, as amended by Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 302(a), 96 Stat. 792, provides:

> If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

STATEMENT

The Court of Appeals for the Federal Circuit in this case estopped the Office of Personnel Management (OPM) from applying the terms of 5 U.S.C. 8337(d). That Section provides that a disability annuitant who earns more than a certain statutory limit on income in any one year is deemed restored to "earning capacity," and therefore loses his or her disability annuity. In 1986, respondent earned more

than the statutory limit, and OPM discontinued his annuity. The court of appeals ordered the payments withheld to be released because two Navy employees incorrectly had told the respondent that his disability annuity would not be discontinued unless he earned more than the statutory limit during *two* consecutive years, and also had given the respondent an outdated circular reflecting the incorrect information. The court ruled that this behavior constituted sufficient "affirmative misconduct" to warrant an exception to the general rule that the government may not be estopped from enforcing the laws.

1. Congress has provided that federal employees who complete at least five years of service and become disabled may retire and receive a disability annuity. 5 U.S.C. 8337(a) (Supp. IV 1986). If an annuitant under 60 years of age recovers from a disability, or is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement," the annuity terminates. 5 U.S.C. 8337(d).

An individual is deemed restored to "earning capacity" if his or her wages for a given period of time exceed a specified statutory cap. Prior to 1982, the statute provided that an individual retired for disability was deemed "restored to earning capacity," and thus no longer eligible for a disability annuity, if

> *in each of 2 succeeding calandar years* the income of the annuitant from wages or self-employment * * * equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (1976 ed.) (emphasis added).

The provision was amended in 1982 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-253, § 302(a)(1), 96 Stat. 792, to provide that if the statutory

cap on earnings is exceeded in any one year, the annuity is to be terminated:

> Earning capacity is deemed restored if *in any calendar year* the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (emphasis added).

2. Respondent retired from his position as a welder with the Navy in 1981, after OPM had approved his application for disability retirement. In January 1986, respondent asked a Navy Employee Relations Specialist at the Navy Public Works Center in San Diego, California, for information about how much he could earn without exceeding the statutory limit. The Specialist erroneously told respondent about the provisions of the pre-1982 version of Section 8337(d)—that his annuity would not be discontinued unless, in each of two succeeding years, he earned at least 80 percent of the current rate of pay for the position he held prior to retirement. App., *infra*, 2a. The Specialist also gave respondent a copy of Federal Personnel Manual Letter No. 831-64 (1981), a publication of the Office of Personnel Management that, while correct when written, was out-of-date. It too explained the two-year rule of the pre-1982 statute. App., *infra*, 2a & n.4. In January 1987, respondent again went to the Navy seeking advice on earnings. Another Employee Relations Specialist erroneously gave respondent the same incorrect information.

3. From 1982 through 1986, respondent earned an average of $12,494 by working as a school bus driver. App., *infra*, 21a. Based on the erroneous information he received from the Navy and the OPM circular, respondent, in the year 1986, earned $19,936—more than the

amount permitted by statute.[1] *Ibid.* As a result, OPM discontinued his annuity as of June 30, 1987. App., *infra*, 25a-29a. However, because respondent earned less than the statutory cap on earnings in 1987, his disability annuity was restored as of January 1, 1988. Respondent, therefore, was without his annuity payments for a period of six months. App., *infra*, 1a n.1.

Respondent sought review of the OPM decision by the Merit Systems Protection Board (MSPB). He contended that OPM was equitably estopped from discontinuing his annuity payments because he had received misinformation from Federal Personnel Manual Letter No. 831-64, the circular given him by the Navy. An MSPB administrative judge rejected the estoppel claim, holding that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." App., *infra*, 22a. In addition, the administrative judge found that respondent had demonstrated by virtue of his income that he had been restored to earning capacity in 1986 and "that he was not entitled to a continuation of the retirement annuity for that year." *Ibid.*

After the MSPB denied his petition for review (App., *infra*, 32a-33a), respondent sought further review in the Federal Circuit pursuant to 28 U.S.C. 1295(a)(9).

4. A divided panel of the Federal Circuit reversed. It acknowledged as "a long-established rule" the traditional reluctance of courts to apply estoppel against the government. But in its view this Court's decision in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), indicated that the government may be estopped upon a finding that

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[1] In order to continue to receive his disability annuity, respondent was required to earn less than $19,016.74 (80 percent of the base salary ($23,771) for a WG-10, Step 4 welder as of December 31, 1986). App., *infra*, 21a.

the traditional elements of estoppel are present and that the government has engaged in "affirmative misconduct." App., *infra*, 3a-10a. Applying this approach, the court first found the traditional elements of estoppel: it concluded that the government knew the facts; that the government gave misinformation to the respondent with the intent that he rely on it; and that the respondent, in good faith, did reasonably rely on it to his detriment. App., *infra*, 9a, 12a. Second, the court ruled that the government, by providing the respondent "with an OPM letter which summarized a law which had been changed some 4 years earlier" had engaged in "sufficient '[affirmative] misconduct' for estoppel to apply." App., *infra*, 10a. The court then rejected the argument that estoppel could not be used to award benefits to one ineligible for them, holding that where an individual would have been eligible "but for" the conduct of the government, it is "no bar" to an estoppel "[t]hat a statutory requirement is thereby effectively nullified." App., *infra*, 13a. The court concluded that estoppel was warranted in this case.

Judge Mayer dissented. In his view, the case was controlled by this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *Heckler* v. *Community Health Services, supra*, because the government agents' negligence here was no worse than in those cases. App., *infra*, 15a-19a. In addition, the dissent found estoppel inappropriate because the respondent had suffered no "irreparable injury" but rather had demonstrated that his earning capacity was, in fact, "restored." App., *infra*, 17a, 19a. Judge Mayer concluded that, while this Court may have left open the question whether the government might be estopped upon a showing of "at least some form of egregious misconduct," "[o]urs is not that kind of case." App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

On the ground that government agents negligently gave respondent written misinformation about the applicable law, the court below estopped the government from enforcing the requirements of 5 U.S.C. 8337(d). That conclusion cannot be reconciled with this Court's prior rulings refusing, for reasons both of constitutional dimension and sound policy, to estop the government from executing the laws as written by Congress because of the errors of government agents. There are millions of such employees; their mistakes should not determine how the law is applied, or which claims will drain the public treasury.

Moreover, if a court can ever estop the government, a threshold requirement is a proper finding of the traditional elements of estoppel. *Heckler* v. *Community Health Services*, 467 U.S. at 61. Two such elements—reasonable reliance and sufficient detriment—are lacking here. And, even assuming that these threshold elements of estoppel are present, no estoppel against the government is warranted in this case. This Court has left open the question whether the government may be estopped if the traditional elements are coupled with the "affirmative misconduct" of its employees. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 788-790. The conclusion of the court below that affirmative misconduct may serve as a basis for estoppel, and its clearly erroneous determination that the ordinary negligence of the employees here was sufficient to satisfy such a standard, sharpens existing conflicts within the courts of appeals over whether, and under what circumstances, the government may be estopped. Given the importance of this question to the efficient and lawful operation of the government, this Court's review of the holding below is warranted.

1. The court of appeals' decision cannot be reconciled with the decisions of this Court. Since its earliest cases, this Court has repeatedly ruled that the government may not be estopped from enforcing the laws.[2] Indeed, to our knowledge, the Court has never held the government estopped, whether the party seeking an estoppel has relied on a misrepresentation of fact (*Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)), or of law (*Heckler* v. *Community Health Services, supra,*); an oral misrepresentation (*Utah* v. *United States*, 284 U.S. 534 (1932), or a written one (*Lee, supra*); an off-hand remark by a federal employee (*Montana* v. *Kennedy*, 366 U.S. 308 (1961)), or a course of conduct by a federal agency or department (*INS* v. *Hibi*, 414 U.S. 5 (1973)).

a. The Court's rule is based on the principle that, despite hardship in individual cases, the government cannot be "bound [or] estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). That precept is grounded in the constitutional doctrines of separation of powers and sovereign immunity, as well as in pragmatic considerations of the public interest.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 578-580 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51 (1984). See also *id.* at 68 (Rehnquist, J., concurring) (distinguishing, as non-estoppel cases, *Moser* v. *United States*, 341 U.S. 41 (1951), and *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973)).

The effect of estopping the government by treating as true the misrepresentations of its agents is to give the words of Executive Branch officials the force of law, while suspending implementation of the conditions established by Congress. Estoppel of the government thus can confer on government employees the status of legislators, and effectively override the mandates of Congress. See *Merrill*, 332 U.S. at 383. That result is beyond the proper authority of the courts. See *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988) ("[I]t is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law").

The rule that the government cannot be estopped is like those providing that the sovereign is exempt, absent contrary provision by Congress, from the consequences of its laches or the operation of statutes of limitations. *Utah Power & Light*, 243 U.S. at 409. "[I]ndependently of the royal prerogative once thought sufficient to justify it," the source of the rule's continuing vitality "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); see also *Costello* v. *United States*, 365 U.S. 265, 281 (1961); *United States* v. *Hoar*, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, Circuit Justice). Where Congress has imposed certain conditions on eligibility and has not provided for their waiver, "[a] Court of equity cannot, by avowing that there is a right but no remedy known to the

law, create a remedy in violation of law." *Pangilinan*, 108 S. Ct. at 2216.

The rule prohibiting estoppel is critical to the government's effective operation. It is unfortunately impossible for the government to prevent every instance in which one of its millions of employees may give out erroneous information.[3] To bind the government in each case to the representations of its employees would uncontrollably drain public revenues and resources. See *Hansen*, 450 U.S. at 789-780; *Hansen* v. *Harris*, 619 F.2d 942, 949 (2d Cir. 1980) (Friendly, J., dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Moreover, it would prompt needless litigation, much of it founded on allegations of misrepresentation by a government employee that could not be documented or otherwise verified.[4]

Finally, for both constitutional and pragmatic reasons, the rule that the government cannot be estopped from enforcing a lawful statute or regulation applies with special force when a party seeks to require the expenditure of public funds in circumstances that do not meet the express conditions established by Congress. See U.S. Const. Art. 1, § 9, Cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); *Community Health Services*, 467 U.S. at 51.

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[3] Over a century ago, when the government was a fraction of its present size, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses," if equitable doctrines applicable to private parties were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824).

[4] We note in this connection that Congress has precluded claims against the government for misrepresentation by its employees under the Federal Tort Claims Act. 28 U.S.C. 2680(h).

b. The facts of this case do not differ in any material respect from those in this Court's earlier cases refusing to estop the government. Indeed, this case is a textbook example of why the government should not be barred from enforcing the laws. Respondent properly drew a disability annuity, but that annuity was subject to the constraints of 5 U.S.C. 8337(d). When respondent earned more than the statutory limit set by that Section, he lost his annuity, as the law provides. Although the annuity was later reinstated, respondent sued, claiming that the Navy's misinformation about the terms of 5 U.S.C. 8337(d) entitled him to the six months of annuity withheld.

This is precisely the situation in which this Court has repeatedly applied its strictures against estopping the government, denying the claims of those who, asserting that a government employee made a negligent misrepresentation to them, seek to receive government benefits without meeting the legal conditions that would make them eligible for those benefits. See, *e.g.*, *Community Health Services*, 467 U.S. at 64 (Medicare reimbursement); *Hansen*, 450 U.S. at 785 (Social Security benefits); *Miranda*, 459 U.S. at 15 (permanent resident status); *Hibi*, 414 U.S. at 8 (naturalization); *Merrill*, 332 U.S. at 384-385 (federal crop insurance). The Court has emphasized that this result is especially indicated when an estoppel would force the expenditure of public funds contrary to the express mandate of Congress. See *Community Health Services*, 467 U.S. at 51; *Hansen*, 450 U.S. at 788; *Merrill*, 332 U.S. at 385.

2. Although this Court has declined to rule that "there are *no cases*" in which the government might be estopped, it has directed that "the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Community Health Services*, 467 U.S. at 60-61. Those elements include both

reliance that is reasonable ("in that the party claiming the estoppel did not know nor should * * * have known" of the misrepresentation) and reliance that is detrimental (in that it caused the relying party "to change his position for the worse"). *Id.* at 59, 61. Neither element is present in this case. Moreover, the Federal Circuit's failure properly to require reasonable reliance conflicts with the holdings of other courts of appeals.

a. Reliance on the words of a government employee that contradict those of a published statute or regulation can never be reasonable: "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services,* 467 U.S. at 63. In particular, this Court has consistently held that those seeking public benefits must act with "scrupulous regard" for the requirements of law. Respondent and others are on notice of the administrative regulations controlling the funds they seek. See *Merrill,* 332 U.S. at 384-385; *Community Health Services,* 467 U.S. at 63. *A fortiori,* such persons "[are] charged with knowledge of the United States Statutes at Large." *Merrill,* 332 U.S. at 384.[5]

Nor does the fact that the government official gave respondent an out-of-date government circular affect his duty "to know the law." Although this Court in *Community Health Services* did point to the oral nature of the advice given there as a factor in its analysis of the reliance element, see 467 U.S. at 65, it did not suggest that reliance

[5] Indeed, even between private parties, estoppel cannot be applied "[i]f, at the time when he acted, [the party seeking estoppel] * * * had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant." 3 J. Pomeroy, *Equity Jurisprudence* § 805, at 192 (S. Symons ed. 1941), quoted in *Community Health Services*, 467 U.S. at 59.

is reasonable whenever advice is in writing. Indeed, this Court and the lower federal courts have regularly declined to estop the government despite the fact that some misrepresentation was committed to paper.[6] By abandoning this precedent, the court below has conferred estoppel claims on any number of individuals who may have picked up or negligently been given out-of-date circulars.[7]

In addition, the Federal Circuit's broad finding of reasonable reliance conflicts with the decisions of the Seventh

[6] See, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. at 183-184 (IRS not estopped from retroactively enforcing corrected administrative rulings despite earlier rulings to contrary); *United States* v. *Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1988); *Scime* v. *Bowen*, 822 F.2d 7 (2d Cir. 1987); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974); see also *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (government not estopped from enforcing statute in manner contrary to earlier administrative rulings by Interior Department); *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) (government not estopped where city commissioners recorded in journal a promise of conveyance of land, which they were without authority to implement).

[7] The court also held that respondent relied "not on incorrect advice from 'government agents' " but "on incorrect advice from the government itself." App., *infra*, 13a. To the extent respondent argues that "the government itself" published the OPM letter, the rule against estoppel in government cases plainly is not limited to situations in which an individual employee acts in a manner that adversely affects a party's application for benefits. For instance, the delay in processing a petition for adjustment of immigration status at issue in *INS* v. *Miranda* was not attributable to any employee's conduct, but was considered on the premise that it was the act of the Immigration and Naturalization Service as a whole. 459 U.S. at 18 & n.3. Similarly, the suspension within the Philippines of the special overseas naturalization program in *INS* v. *Hibi* was ordered by the Attorney General, in consultation with the Commissioner of Immigration, and reflected the official policy of the United States. See 414 U.S. at 10-11 (Douglas, J., dissenting).

and Tenth Circuits. The Seventh Circuit has held that, except in narrow circumstances not relevant here (see generally, pp. 22 & n.22, *infra*), a party claiming a misrepresentation by a government official is "charged with knowledge of the law" and thus cannot demonstrate the reliance traditionally required to support estoppel. See *In re Larson*, 862 F.2d 112, 114-115 (1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017, 1020-1021 (1987). Similarly, the Tenth Circuit has held that a party relying on an erroneous interpretation of a regulation by an administrative agency "assumes the risk" that the interpretation is erroneous. See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411 (1984); *United States* v. *Browning*, 630 F.2d 694, 702-703 (1980), cert. denied, 451 U.S. 988 (1981).[8]

b. Respondent's claim of detriment also dissolves upon examination. "To analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse." *Community Health Services*, 467 U.S. at 61.

At the heart of this lawsuit is respondent's complaint that he missed the opportunity to manipulate the law for his personal gain—that he should have been given correct advice so that he could have received both a government disability annuity and the highest attainable level of wages from his employment as a bus driver. This desire to work the system as close to the edge as possible, while not illegal, is surely not the type of detriment that traditionally

[8] Without making explicit findings that reasonable reliance was lacking, a number of circuits have declined to allow estoppel on the basis of an unauthorized misrepresentation of law. See, *e.g.*, *Goldberg* v. *Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976). We discuss these holdings in more detail below (see pp. 19-22, *infra*).

supports an estoppel. As Judge Mayer correctly observed, "Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers." App., *infra*, 19a.

The statute in this case reflects Congress's judgment that earned wages of at least 80 percent of the current rate of pay of a retiree's former position indicate a restored capacity to earn and hence, a loss of disability. Respondent did in fact demonstrate that he had the "capacity" to earn more than 80 percent of his former job's salary. Given the purpose of Section 8337(d) to measure "earning capacity," respondent thus was not substantively entitled to his disability annuity. He cannot claim that the detriment he faces because the government ascertained his actual capacity "is so severe or has been imposed in such an unfair way that [the government] ought to be estopped from enforcing the law in this case." *Community Health Services*, 467 U.S. at 66.

3. Despite the general rule that estoppel should not be applied to obstruct enforcement of the law, and the fact that not even the elements traditionally required to estop a private party were present here, the court of appeals estopped the government on the ground that its agent had engaged in "affirmative misconduct."[9] Its action illustrates

[9] As noted above (see pp. 11-12, *supra*), the Court in *Community Health Services* made clear that a claim of "affirmative misconduct" cannot succeed in any case if the traditional elements of estoppel are not met. In *Community Health Services*, a fiscal intermediary charged with administering the receipt, disbursement, and accounting of funds granted a nonprofit health care provider under the Medicare program repeatedly gave misinformation to that organization. This negligence pushed the health care provider into severe financial turmoil when it led to a $71,480 overpayment determination. 467 U.S. at 62. This Court's holding clarified that even an agent's sustained negligence does not warrant an evasion of the traditional requirements of estoppel, including reasonable reliance and detriment.

the need for guidance: the absence of a clear standard for the application of estoppel to the government has led to anomalous results like that in the present case and has prompted the development of conflicting standards among the courts of appeals.

a. The court of appeals' application of an affirmative misconduct "exception" to the rule against estopping the government is based on language in this Court's opinions but is incompatible with the principles enunciated there.

The Court has left open the question whether "affirmative misconduct" by government agents may in some cases justify estoppel of the government. *Community Health Services,* 467 U.S. at 60-61; *Miranda,* 459 U.S. at 17-18; *Hansen,* 450 U.S. at 788; *Hibi,* 414 U.S. at 8-9; *Montana,* 366 U.S. at 314-315. But as explained above (see pp. 8-10, *supra*), the reason this Court has declined to estop the government is to protect the public interest from the consequences of error or misconduct by government employees. In particular, the doctrine ensures that the actions of those in the Executive Branch do not interfere with the proper execution of the laws written by Congress. Estoppel of the government undermines these purposes, whether a government representative's actions are merely negligent or rise to some unspecified higher level of misconduct. It would be inconsistent with the theoretical underpinnings of the general rule for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that the responsible agency officials did not approve, and never would have approved, of the representatives' actions.

b. Were this Court to decide that the estoppel doctrine warranted an affirmative misconduct exception, the exception would not in any event apply here. The misrepresentations made by the Navy employees in this case cannot

be distinguished from the behavior of other government agents that the Court has found to fall " 'far short' " of affirmative misconduct. *Hansen,* 450 U.S. at 790 (quoting *Montana,* 366 U.S. at 314).

In *Schweiker* v. *Hansen,* a Social Security Administration claims representative incorrectly informed a claimant that she could not qualify for benefits and failed, contrary to the agency's claims manual, to recommend that she file a written application. 450 U.S. at 786. Because a written application was required under agency regulations (*id.* at 790), the claimant lost her entitlement to approximately 12 months of benefits for which she was otherwise eligible. In *Montana* v. *Kennedy,* an American consular official erroneously advised the petitioner's mother that she could not travel to the United States because she was pregnant. Consequently, the petitioner was born abroad and could not claim American citizenship by birth. In these cases, as in a number of others, the Court found that conduct of government agents at least as blameworthy as that here was far less than would warrant estoppel of the government.[10]

The court of appeals sought to distinguish the present case on the ground that the respondent was given written,

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[10] See also *Hibi*, 414 U.S. at 8-9 (no affirmative misconduct where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *Miranda*, 459 U.S. at 19 (no affirmative misconduct where INS failed to act on visa petition for 18-month period); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184 (1957) (facts insufficient to support estoppel where IRS Commissioner, who had followed erroneous interpretation of tax law, sought to apply corrected ruling retroactively); *Merrill, supra* (same, where government agent erroneously advised farmers that their crop was insurable and aided their application to government); *United States* v. *San Francisco*, 310 U.S. 16, 31-32 (1940) (same, where government sought to enforce provisions of Raker Act in manner contrary to earlier administrative rulings by Interior Department).

not only oral, misinformation. While this Court has noted that written information may induce greater reliance than oral information (*Community Health Services,* 467 U.S. at 65; see pp. 12-13, *supra*), it has never suggested that a government agent commits "affirmative misconduct" whenever he or she negligently passes on misinformation in writing. To the contrary, the Court has made clear that any concept of "affirmative misconduct" requires more egregious behavior.[11] Indeed, the employees' actions here fit into the same category of behavior that this Court determined to fall " 'far short' " of affirmative misconduct in *Hansen*: like the claims representative there, the employees in this case negligently provided outdated information; they did not deliberately mislead the respondent, make false promises, or otherwise defraud him. See 450 U.S. at 790 (quoting *Montana,* 366 U.S. at 314); cf. *Scime* v. *Bowen,* 822 U.S. 7, 9 (2d Cir. 1988) (case in which erroneous advice about eligibility for benefits was conveyed in writing is indistinguishable from *Hansen*).

The presence of written misrepresentation no more rationalizes the application of estoppel to the government than the presence of other forms of misconduct. In each case, the errors of Executive officials are compounded, not resolved, by a judicial requirement that the mandates of Congress be violated. Further, to the extent that the court of appeals' decision turns on the receipt of an out-of-date government publication, it opens the door to potential government liability on every claim that a duly enacted law does not apply to one who has solicited and received,

[11] See, *e.g., Miranda, supra* (no estoppel on the basis of an 18-month delay by the INS which cost an immigrant his residency rights); *Hibi,* 414 U.S. at 8-9 (no estoppel despite failure by Executive officials to give full publicity to naturalization rights or to make personnel available to those wishing to effectuate those rights).

or simply taken home from a government office, a circular containing out-of-date, and therefore inaccurate, information.[12]

c. The uncertain state of the law in this are has generated a confusion of approaches to estoppel in the courts of appeals. See *Hansen,* 450 U.S. at 792 (Marshall, J., dissenting) (chiding Court for failure to give guidance to lower courts); *Home Savings & Loan* v. *Nimmo,* 742 U.S. 585, 586 (10th Cir. 1984) (requesting Court to clarify estoppel standard). In particular, the lower courts are sharply divided over whether, and in what circumstances, an affirmative misconduct exception applies. See, *e.g., Akbarin* v. *INS,* 669 F.2d 839, 842-843 (1st Cir. 1982) (reviewing confusion over meaning of "affirmative misconduct").

i. In sharp contrast to the Federal Circuit, three circuits (the Tenth, the Eleventh, and the District of Colum-

[12] The weight accorded the circular by the court below also brings its holding into conflict with the decisions of a number of other courts of appeals. In *Crown, supra,* Railroad Retirement Board employees repeatedly misinformed a railroad employee about the amount of annuity he could expect to receive upon retirement, and a district manager confirmed the mistaken estimates in a letter; the misrepresentations induced the employee to retire. The Seventh Circuit did not consider that the existence of writing (which reflected far greater deliberation than the "writing" did here) affected the rule that estoppel should not be applied to force the government to pay benefits to one not statutorily entitled to them. 811 F.2d at 1021-1022. The Second Circuit also has declined to give written communications such dispositive weight. See *Scime* v. *Bowen,* 822 F.2d 7, 9 (1987) (finding no affirmative misconduct despite erroneous written advice regarding eligibility for benefits); *Dorl* v. *Commissioner,* 507 F.2d 406, 407 (1974) (no estoppel despite misrepresentation contained in letter from I.R.S. agent). Accord *United States* v. *Killough,* 848 F.2d 1523, 1526-1527 (11th Cir. 1988).

bia) have declined to recognize an "affirmative misconduct" exception to the general rule and have instead constructed a circuit-specific approach. Thus the Eleventh Circuit, eschewing the "hypothetical" question whether such an exception applies,[13] has declared estoppel to be appropriate only where the traditional elements are present, the government is acting in its "proprietary" capacity, and the government agent was acting within the scope of his or her authority.[14] The District of Columbia Circuit has held that when the traditional elements of estoppel are combined with "a showing of injustice," estoppel will lie against the government providing there is no "undue damage to the public interest."[15] And the Tenth Circuit

[13] *Deltona Corp.* v. *Alexander*, 682 F.2d 888, 892 (1982); see also *Lyden* v. *Howerton*, 783 F.2d 1554, 1558-1559 (1986).

[14] See *United States* v. *Killough*, 848 F.2d 1523, 1526 (1988); *United States* v. *Vonderau*, 837 F.2d 1540, 1541 (1988); *Federal Deposit Ins. Corp.* v. *Harrison*, 735 F.2d 408, 410-411 (1984); see also *George* v. *Railroad Retirement Board*, 738 F.2d 1233, 1236 (1984) (declining to determine whether "affirmative misconduct" can estop government acting in "sovereign" capacity on ground that misrepresentation of government agent concerning eligibility for benefits did not amount to such misconduct).

The Eleventh Circuit's attention to the "proprietary" nature of government activity is contrary to this Court's determination in *Merrill*, 332 U.S. at 383, that the government does not become "another private litigant • • • whenever it takes over a business • • • or engages in competition with private ventures." The Circuit's approach has been rejected by a number of other courts. See, *e.g.*, *Wagner* v. *Director, Federal Emergency Management Agency*, 847 F.2d 515 (9th Cir. 1988); *Phelps* v. *Federal Emergency Management Agency*, 785 F.2d 13, 17 (1st Cir. 1986).

[15] See *ATC Petroleum, Inc.* v. *Sanders*, 860 F.2d 1104, 1111 (1988); see also *GAO* v. *GAO Personnel Appeals Board*, 698 F.2d 516, 526 (1983) (requiring misrepresentation by government agent that would cause "egregiously unfair result").

has held that the application of estoppel against the government is justified only when "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation."[16] Contrary to the practice of the Federal Circuit, the government cannot be estopped in the Tenth Circuit solely on the ground that an agent without authority to bind the government has misled an individual.[17]

ii. A number of circuits have applied an affirmative misconduct standard, but have done so in varying ways. Thus the Ninth Circuit requires affirmative misconduct "going beyond mere negligence," but permits estoppel only if the government's act has caused a serious injustice and the public's interest will not suffer "undue damage."[18] And the Eighth Circuit, without defining the term, has rejected estoppel in circumstances analogous to those here.[19]

[16] See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411, 1416 (1984); see also *United States* v. *Wingfield*, 822 F.2d 1466, 1476 (1987) (estoppel requires establishing traditional elements and attention to "additional consideration" that it may undermine "interest of citizenry • • • in obedience to the rule of law"), cert. dismissed *sub nom. County of Boulder* v. *United States*, 108 S. Ct. 1762 (1988).

[17] See *United States* v. *Browning*, 630 F.2d 694, 702 (1980), cert. denied, 451 U.S. 988 (1981); *Emery*, 744 F.2d at 1416.

[18] See *Morgan* v. *Heckler*, 779 F.2d 544, 545 (9th Cir. 1985); *Watkins* v. *United States Army*, No. 85-4006 (May 13, 1989) (en banc), slip op. 15. Perhaps because the Ninth Circuit has "no single test for detecting the presence of affirmative misconduct" but decides each case "on its own particular facts and circumstances" (*Watkins*, slip op. 15-16), its application of the standard has not been uniform. Compare *Mukherjee* v. *INS*, 793 F.2d 1006, 1008-1009 (1986) (no estoppel where vice-consul negligently misrepresented exemption from residency requirement) with *Watkins, supra* (in view of prior practice of allowing reenlistment of homosexual soldier, army is estopped from enforcing regulations prohibiting his reenlistment).

[19] See *Leimbach* v. *Califano*, 596 F.2d 300, 305 (1979) (government not estopped from denying benefits where agents repeatedly gave

The First Circuit similarly has rejected the claim that statutory requirements should not be enforced because of the misrepresentations of a government agent,[20] but has occasionally recognized an exception, including the possibility of estoppel on the basis of a misrepresentation where deportation is at stake.[21] Finally, the Second and Seventh Circuits have developed estoppel approaches that include narrow and conflicting exceptions, although both generally require the presence of affirmative misconduct.[22]

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misinformation about eligibility); see also *United States* v. *Manning*, 787 F.2d 431, 436-437 (1986) (no estoppel on ground of misleading statements).

The Eighth Circuit has abstracted the meaning of "affirmative misconduct" from this Court's decisions "by negative implication." *Chien-Shih Wang* v. *Attorney General*, 823 F.2d 1273, 1276 (1987). A similar approach—defining affirmative misconduct by determining what this Court has declined to label as such, and then noting that the case before it falls "far short" of such behavior—marks the decisions of several circuits. See, *e.g.*, *Zimmermann* v. *Heckler*, 774 F.2d 615, 617 (4th Cir. 1985).

[20] See *Phelps* v. *Federal Emergency Management Agency*, 785 F.2d 13, 17 (1986) (disallowing estoppel defense raised by claimant who failed to comply with procedural prerequisites for obtaining government flood insurance payments).

[21] See *Akbarin* v. *INS*, 669 F.2d 839 (1982); see also *Best* v. *Stetson*, 691 F.2d 42 (1982) (applying estoppel standard "closer to that involved in ordinary cases" to government where regulations with which party did not comply were later found unconstitutional).

[22] See, *e.g.*, *Scime*, 822 F.2d at 9; *Corniel-Rodriguez* v. *INS*, 532 F.2d 301, 306-307 (2d Cir. 1976); *Edgewater Hospital, Inc.* v. *Bowen*, 857 F.2d 1123, 1137-1139 (7th Cir. 1988); *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982). In the Second Circuit, the government cannot be estopped from enforcing legal requirements determining entitlement to benefits (see *Scime*, 822 F.2d at 9; *Goldberg*, 546 F.2d at 480-481), except in certain circumstances where it has failed to perform a legally required task in the immigration context (see *Corniel-Rodriguez*, 532 F.2d at 306-307; *Scime*, 822 F.2d at 9 (limiting *Corniel-Rodriguez*)). The Seventh Circuit, by contrast, has held more generally that reliance on the misrepresentation of a government agent cannot form the basis of an estoppel that forces payment of statutory benefits to which a party is not entitled. See *In re Larson*, 862 F.2d 112, 114 (1988); *Crown*, 811 F.2d at 1021. But that circuit has estopped the government in certain limited circumstances involving "proprietary" or similar activities (see, *e.g.*, *Portmann*, *supra*; *United States* v. *Fox Lake State Bank*, 366 F.2d 962 (1966)), upon occasion doing so without requiring the presence of affirmative misconduct (see *Azar* v. *United States Postal Service*, 777 F.2d 1265 (1985)). See generally *Crown*, 811 F.2d at 1021 (limiting cases).

4. The holding in this case is of great importance to OPM and other government agencies. The Federal Circuit's exclusive jurisdiction includes, *inter alia*, important cases under the Contract Disputes Act of 1978 (28 U.S.C. 1295(a)(10)), most matters involving the Merit Systems Protection Board (28 U.S.C. 1295(a)(9)), and claims for money damages brought against the government under the Tucker Act (28 U.S.C. 1295(a)(2) and (3)). The facts in this case are unexceptional; if the Federal Circuit can estop the government on the basis of the type of negligence that occurred here—unfortunate and improper but hardly egregious—it will regularly obstruct proper execution of the laws. In addition, the holding below further accentuates existing conflicts among the courts of appeals: the success of an estoppel claim now varies widely depending on the federal court in which it is heard.

Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JUNE 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

DECIDED: December 2, 1988

Before: MAYER, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

MICHEL, *Circuit Judge*

The decision of the Merit Systems Protection Board (board), Docket No. SF831L8710762, affirming the Office of Personnel Management's (OPM's or the agency's) ruling that Charles Richmond is ineligible for disability annuity payments after June 30, 1987 because, in view of his income in 1986, Mr. Richmond has been restored to earning capacity, is reversed and the case is remanded.[1]

Background

The facts and the applicable statutory law are undisputed. If a person receiving a disability retirement annuity is restored to an earning capacity fairly comparable

[1] Respondent's brief states without full explanation that, notwithstanding the agency's original decision that Mr. Richmond had been restored to earning capacity, the agency reinstated Richmond's disability payments as of January 1, 1988. Res. Br. at 4. Accordingly, the brief further states, the agency's original decision only denied Mr. Richmond benefits for the months July through December, 1987. Our decision then applies at least to the aforementioned 6 month period.

to his former position, payment of the annuity shall be terminated 180 days after the end of the calendar year in which restoration occurred. 5 U.S.C. § 8337(d) (Supp. 1988). Earning capacity is deemed restored if, in any single calendar year, the annuitant's earned income equals at least 80% of the current rate of pay for his former position. The agency discontinued disability annuity payments to Mr. Richmond, a retired[2] welder, WG-10, Step 4, formerly employed by the United States Department of the Navy, as of June 30, 1987. The payments were discontinued because Richmond's income during calendar year 1986 exceeded 80% of his former job's current base salary.[3]

Although application of the relevant statute to Richmond's case appears straightforward, Richmond argues, and indeed the board found in the face of no dispute by the agency, that Navy employee relations specialists misinformed Richmond that the measuring period for determining restoration was 2 years rather than a single calendar year. As late as January, 1986, Richmond received from the Navy written OPM notice that when, in each of 2 consecutive years, earned income equals at least 80% of the current rate of pay for the position retired from, earning capacity is deemed restored and the disability annuity is stopped.[4] Apparently the misrepresentation to Richmond resulted because prior to the enactment of Public Law

[2] According to the agency's brief, Richmond retired from federal service on June 6, 1981.

[3] As stated in the board's decision, the base salary for a WG-10, Step 4, as of December 31, 1986, was $23,771. Eighty percent of $23,771 is $19,016.74. Richmond reported an income of $19,936 for 1986.

[4] In response to Richmond's inquiries, petitioner was given a copy of Federal Personnel Manual Letter 831-64, Attachment 4, issued by OPM and containing the misinformation.

97-253, § 302(a)(1), effective December 31, 1982, the applicable statute, 5 U.S.C. § 8337(d), called for restoration to earning capacity to be determined based on earnings for "each of 2 succeeding calendar years." In reliance on the misinformation in this OPM letter, Richmond, who subsequent to his retirement was working as a bus driver, accepted additional hours of work in 1986. He believed that the additional hours of work, which he says are not normally available to him, would temporarily increase his income, but would not cause loss of his disability benefits.

In reviewing the agency's action, the board stated that "[a]lthough it is undisputed that appellant's former employer, the Department of the Navy, gave appellant misinformation upon which he relied, that agency was not the Office of Personnel Management (OPM)." Accordingly, the board held that OPM cannot be estopped from enforcing a statutorily imposed requirement for terminating disability retirement eligibility, and observed that Richmond should have sought and entertained information respecting continued eligibility only from OPM. Richmond appeals.

ISSUE

Whether on the facts and circumstances of this case the OPM is estopped from terminating Richmond's disability benefits because relying on an OPM letter he allowed his earned income in 1986 to exceed 80% of his former job's current base salary.

OPINION

We do not agree with the board's view that the agency cannot be estopped from discontinuing Richmond's disability benefits. In our view, the agency can be estopped because of the affirmative misconduct of the government

in informing Richmond in writing in 1986 that his right to disability benefits would be maintained if Richmond's income did not exceed the 80% ceiling for 2 consecutive years. Richmond would have foregone the additional, temporary 1986 wages and maintained his eligibility for disability benefits had he not relied upon the out-of-date OPM letter given him by Navy employees whom he had no reason to believe were not providing him with accurate information.

We are aware of the long-established rule that ordinarily the government may not be estopped because of erroneous or unauthorized statements of government employees when the asserted estoppel would nullify a requirement prescribed by Congress, *see, e.g., Schweiker* v. *Hansen,* 450 U.S. 785, 788 (1981) (per curiam)[5] and that generally "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Community Health Services of Crawford,* 467 U.S. 51, 63 (1984). However, the Supreme Court has clearly left open the possibility that estoppel may be invoked against government agencies in some particular circumstances. In *Community Health Services,* the Supreme Court specifically declined an invitation to announce a flat rule that "estoppel may not in any circumstances run against the Government." *Id.* at 60. Instead the Court said:

> Though the arguments the Government advances for the rule [that estoppel may never run against the Government] are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are

[5] Government was not estopped from denying "mother's insurance benefits" to respondent who had failed to file for them because of erroneous *oral* advice of Social Security Administration field representative that she was ineligible.

> *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Id. at 60-61 (emphasis in original) (footnote omitted).

Since the Supreme Court's decision in *Community Health Services,* courts of appeals have determined whether, on the facts of a given case, estoppel should be applied against the government. Certain cases have determined that estoppel should apply. In *Fano* v. *O'Neill,* 806 F.2d 1262 (5th Cir. 1987), Fano had asserted before the district court that the government was estopped from denying him permanent resident status since when he filed he met all requirements and was denied permanent residency only because the government had "recklessly and negligently" delayed processing his application and in the meantime, he became ineligible as over 21 years of age. *Id.* at 1265. The processing delay was in direct contradiction to the Service's Operations Instruction on which Fano had relied in filing his application just prior to his 21st birthday, and according to which such applications were to receive urgent processing. *Id.* at 1263. The district court granted summary judgment rejecting Fano's estoppel argument.

The court of appeals stated that, according to Supreme Court cases, in order for estoppel to apply, Fano had to show some sort of "affirmative misconduct" on the part of the government. *Id.* at 1265. The court further observed that "to state a cause of action for estoppel against the government, a private party must allege more than mere negligence, delay, inaction or failure to follow an internal agency guideline." *Id.* In the court's view, Fano's allega-

tions of reckless and negligent, and possibly even willful and wanton delay, could establish affirmative misconduct. Accordingly, the district court was required to allow Fano to develop his case through discovery since, if proven, his charges could support estoppel. *Id.* at 1266. The causes for the delay presented genuine issues of material fact possibly showing affirmative misconduct and giving rise to an estoppel.[6]

Our own decisions have also recognized the viability of government estoppel. In *USA Petroleum Corp.* v. *United States,* 821 F.2d 622 (Fed. Cir. 1987), we stated "[t]he equitable defense of estoppel is available to parties contracting with the government and requires a case-by-case determination designed to avoid injustice." *Id.* at 625. In that case we made note of the traditional elements of estoppel as set out by the lower court:

> 1. The party to be estopped must know the facts;
> 2. he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
> 3. the latter must be ignorant of the true facts; and
> 4. he must rely on the former's conduct to his injury.

[6] In our view, the decision in *Fano* is not undermined by the subsequent Supreme Court decision in *Immigration and Naturalization Service* v. *Pangilinan,* 108 S. Ct. 2210 (1988). *Pangilinan* involved the respondents' recent application for citizenship under a special immigration statute that expired in 1946. *Id.* at 2214. There was no indication that the respondents had relied on any misinformation from the government in waiting more than 30 years after the statute expired before petitioning for citizenship. Nonetheless, the Ninth Circuit ordered naturalization of the respondents. *Id.* at 2212. The Supreme Court held that under these circumstances it was improper to ignore the statutory provisions for determining eligibility for citizenship. *Id.* at 2216.

Id. We concluded that these elements of estoppel had been established by the contractor. Specifically, we observed that the government failed to conform quantities of oil it reported for payment purposes to the actual quantities it knew were delivered by the contractor. As a result of these discrepancies, the government overpaid the contractor for the oil, and the contractor in turn made unrecoverable overpayments to its suppliers. *Id.* at 623.

Additionally, the government waited for 6 months after it knew of the discrepancies to notify the contractor of the overpayments. *Id.* at 625. Based on these facts, we determined that the government was estopped from seeking restitution from the contractor. We pointed out that our result in *USA Petroleum* was not inconsistent with *Community Health Services,* which declined to apply estoppel against the government because there the contractor failed to ascertain legal requirements from "the correct channels" and in writing. *Id.* at 626. Our overall conclusion was that the contractor's right to rely on the government's continued written representations as to oil deliveries justified application of estoppel.

More recently, we discussed the application of equitable principles (although not explicitly "estoppel") to government action in *National Corn Growers Association* v. *Baker,* 840 F.2d 1547 (Fed. Cir. 1988). *Corn Growers* involved a temporary provision in the Tariff Schedule that imposed a sixty-cent per gallon tariff on imported ethanol. *Id.* at 1549. When the Commissioner of Customs interpreted the new statute so as to exclude certain imported mixtures in part of ethanol, domestic ethanol producers protested. In response, the Commissioner reversed his prior ruling, deciding to apply the sixty-cent per gallon duty to the previously exempted mixtures. *Id.* In order to avoid unfairness, however, the Customs Service decided to

allow importers who had relied upon the exemption to complete importation of their mixtures free of the applicable duty. *Id.* Corn Growers and others objected, questioning the authority of the Commissioner to limit equitably the application of the tariff provision. *Id.* at 1549-50.

We stated that the Commissioner, having fundamentally reinterpreted the law regarding the ethanol imports, was free not to give the new interpretation retroactive application. We took the view that to require the Commissioner to apply the subject provision as newly interpreted to all importations would be unfair. *Id.* at 1552. Having relied on the government's first stated view of the law, importers "should not be penalized" for following what the government said, based on its subsequent reinterpretation of the law. *Id.* Our decision in *Corn Growers* appears consistent with the cases listed in *Community Health Services* in which the court seemed to acknowledge that estoppel had been properly, although implicitly applied against the government. *See Community Health Services,* 467 U.S. at 60, n.12.

In *Frantz* v. *Office of Personnel Management,* 778 F.2d 783 (Fed. Cir. 1985) our court itself implicitly applied estoppel against the government. We held that OPM may not deny benefits to individuals who have been affirmatively misled by agency officials as to those benefits. In *Frantz* the agency had rejected, as untimely, a late election of a survivor's annuity where an annuitant had earlier received erroneous information from the agency. Based on the misinformation, the annuitant had chosen not to elect to have her husband receive survivor benefits if she predeceased him. *Id.* at 784. An agency personnel counselor had given the annuitant the erroneous information orally and in writing by means of an agency-approved

form. *Id.* We determined that under the circumstances and notwithstanding the subsequent sending of correct information to the annuitant, a reasonable person would at least have been confused as to the proper election. We held that the board's finding to the contrary was not supported by substantial evidence. *Id.* at 787. Accordingly, we ordered the agency to accept the annuitant's application amending her election as to survivor benefits, even though doing so effectively nullified the filing deadline in the act.

Based on the Supreme Court's acknowledgment that the estoppel against the government is not foreclosed and based on court of appeals rulings applying estoppel against the government, our view is that estoppel is properly applied against the government in the present case. Here, the traditional elements of private estoppel all have been met. The government knew that, subsequent to December 31, 1982, restoration to earning capacity must be determined by a beneficiary's earnings in a single calendar year. Furthermore, when the Navy personnel specialists informed Richmond orally and in writing, by way of an OPM letter, that eligibility was determined based on earnings in 2 successive calendar years, the government, acting through the specialists, obviously intended that Richmond accept the truth of the representations. Also, despite his diligence, Richmond remained ignorant of the true state of the law, and relied on the government's representations to his injury. His case is even more compelling than Frantz's because according to *all* the information the government had provided Richmond, he was safe in accepting what additional, temporary wages he could earn in calendar year 1986. Richmond thus did not get conflicting advice that could have confused him; he got consistent advice that misled him.

With regard to establishing "affirmative misconduct," we conclude that the government's action in providing

Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

Nor may the government be heard to assert that Mr. Richmond should not have relied upon the OPM letter given him by Navy personnel specialists, but should have gotten his information solely and directly from OPM. First, Mr. Richmond did get information published by OPM itself, although the OPM letter was obtained from the Navy. Second, unless the government warns annuitants against making inquiries of their former agency of employment, it is simply not fair to prejudice their retirement or disability income because they communicated with their own agency. According to the record before us, no such warning was ever given to Mr. Richmond. In cases such as this where the government is properly subject to estoppel, it cannot avoid the consequences of estoppel simply because the agency which provided the OPM letter was not OPM.

The facts here as to what reasonably appeared to be "correct channels" are quite different than in *Community Health Services*. There the party seeking to assert estoppel obtained oral advice from a private contractor acting as an agent for the government, not from government officials or employees, and from a private individual concerning what plainly was an agency-wide policy issue involving legal requirements. The court rejected reliance under these circumstances as unreasonable. 467 U.S. at 55-56, 61, 65.

Richmond, however, dealt with Navy personnel specialists who gave him a government-wide letter from

OPM, the administering agency for disability annuities. It seems reasonable for him to have assumed that the OPM letter they gave him was both authoritative and current. He did.

On the particular facts of this case, all the elements of estoppel have been shown as has affirmative misconduct. In sum, our view is that Richmond's interest in "some minimum standard" of reliability "outweigh[s]" (*Community Health Services*, 467 U.S. at 61) the government's interest in avoiding estoppel and denying disability benefits to Richmond based on the 1 year rather than the 2 year period for determining continuing eligibility as affected by restoration to earning capacity.

It may be asked whether since in its most specific language in *Community Health Services*, 467 U.S. at 60, the Supreme Court merely left open the possibility of courts applying estoppel against the government, our holding here is permitted. But notwithstanding the absence of affirmative Supreme Court precedent, there can be no doubt that courts may and in fact do apply estoppel against the government. Courts of appeals, including our court, have estopped the government in varying factual contexts in cases such as *Fano* and *USA Petroleum, supra*.

If then estoppel is available against the government in proper cases, given proof of the traditional elements of private estoppel plus affirmative government misconduct, is its availability limited only to cases involving contracts? While our own decision in *USA Petroleum* was concededly a contract case, the Fifth Circuit's decision in *Fano*, dealing with immigration, clearly was not.

Rather than requiring the presence of a contract or some other earmark of a limited class of cases to which estoppel might apply, the logic of the landmark decisions leads to

the conclusion that the most crucial consideration is the objective reasonableness of the reliance. *Community Health Service,* 467 U.S. at 64, 65. Thus, estoppel has been avoided where the individual relied only on oral advice (*Schweiker*, 450 U.S. at 786, 788); and where the advice came from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements (*Community Health Services,* 467 U.S. at 64). Neither of those limitations applies here.

It also may be asked if estoppel can ever be applied to award benefits to one who at least temporarily becomes statutorily ineligible to receive them. The answer, we believe, should depend on what caused the ineligibility. Here, Mr. Richmond was plainly eligible in 1981-86 and was receiving disability retirement checks. Again in 1988, he was apparently deemed eligible and again began receiving checks. As to 1987, it is undisputed that he properly received checks for the first 6 months, but was declared restored to earning capacity and thus ineligible as of July 1987 because of extra wages in 1986 that put him slightly over the income limit for calendar 1986.

Was his salary increased in 1986 to achieve restoration? No, he merely received additional wages for overtime that was not available in other years. Thus, this is not a case where, for example, an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise in order to stay under the limit so as to maintain eligibility. Nor should we find bad faith or manipulativeness in Mr. Richmond's inquiry to the Navy. For one thing, the 80% figure as the measure of restoration of earning capacity (rather than 100%) guards against manipulation of salary levels. Further, it is undisputed here that the increase in income was but temporary.

Before accepting the overtime offered, Richmond inquired about the applicable period for measuring restoration. The OPM letter given him erroneously indicated the period was 2 years. Through nearly all of 1986, Richmond's income remained below the limit; he exceeded the annual income limit only because of the incorrect statement in the OPM letter, which led him to accept the unusual overtime. Since reliance on the government misstatement directly caused the temporary ineligibility, it seems quite unfair to conclude that because of it, estoppel is automatically unavailable. It would seem, rather, that this "but for" relationship presents precisely the situation where estoppel is most appropriate. That a statutory requirement is thereby effectively nullified in an individual case is no bar, as *Fano* shows.

Nor should its application here be avoided by rigid adherence to the axiom that everyone dealing with the government is presumed to know the law and thus to know not to rely on incorrect statements of government agents. In the context of corporations negotiating contracts with the government, there is no reason to limit resort to this axiom. Government contractors typically know the government contracts business and they often have attorneys. In contrast, however, Mr. Richmond is not in the government annuities business and cannot reasonably be presumed to know the specific statutory provisions as they change from time to time. Nor is it likely that this former Navy welder who now drives a bus has attorneys to ask. Instead, he asked Navy personnel specialists. They provided him with the OPM letter. He relied on it. In so doing, Richmond relied not on incorrect advice from "government agents" (*Community Health Services,* 467 U.S. at 63), but on incorrect advice from the government itself. The OPM letter was obviously intended as guidance

for all disability annuitants, was printed under OPM's letterhead, was addressed to "Heads of Departments and Independent Establishments," and was signed by the Acting Deputy Director. Was Mr. Richmond's reliance on it unreasonable? We think not. Was the government reckless in furnishing the superseded OPM letter? We think so.

Our decision is not a departure from our own or Supreme Court precedent. It simply reflects the specific facts in this case. They are sufficiently unusual and extreme that no concern is warranted about exposing the public treasury to estoppel in broad or numerous categories of cases. Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court.

CONCLUSION

Accordingly, the decision of the board is reversed and the case is remanded to the board with instructions to direct the agency to issue the withheld disability benefits to Mr. Richmond.

COSTS

Costs awarded to the petitioner.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

MAYER, Circuit Judge, dissenting.

There is no doubt that the Navy misinformed Richmond. Relying on the Navy's erroneous advice, he worked additional hours and increased his earnings above 80 percent of the pay of a government welder, his pre-disability retirement position, thereby relinquishing eligibility for benefits under the Civil Service Retirement Act. But the Navy's misinformation is no reason for the court today to estop the government from recognizing that Richmond was, in fact, restored to earning capacity, and was no longer eligible to receive a disability annuity. This decision contravenes the express mandate of Congress in 5 U.S.C. § 8337(d) (Supp. 1988), and Supreme Court precedent.

I agree with the court that *Heckler* v. *Community Health Services of Crawford,* 467 U.S. 51, 60 (1984), left open the question of when, if ever, the government can be estopped from enforcing a validly promulgated statute. But this does not mean that we write on a clean state. In *Schweiker* v. *Hansen,* 450 U.S. 785 (1981), a case strikingly similar to the one we decide today, Hansen sought a retroactive award of "mother's insurance benefits" under the Social Security Act. But for the

erroneous advice and negligent behavior of a field representative of the Social Security Administration, she would have received benefits for the period in question. The field representative had failed to familiarize himself with an amendment, then in effect for a year and a half, which afforded benefits to Hansen. Moreover, the field representative failed to follow an internal agency claims manual which expressly required him to advise Hansen that she should file a written application. Had she been so advised, the representative's error would have been obviated, and benefits would have been forthcoming.

Nevertheless, the Supreme Court held that the field representative's "errors 'fal[l] far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with the valid regulation" requiring a written application as a prerequisite to the disbursement of benefits. *Id.* at 790 (quoting *Montana* v. *Kennedy*, 366 U.S. 308, 314 (1961)). The Court said that " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury,' " *id.* at 788 (quoting *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947)), is not abnegated by the plea of an eligible applicant who has lost benefits because of the erroneous advice of a government employee. That was a more meritorious case than ours because Hansen would otherwise have been entitled to benefits, and she at least approached the administering government agency for guidance, which Richmond did not. But this was not sufficient.

Community Health Services, too, held that the government could not be estopped, in that case from recouping funds mistakenly disbursed, even though the error was a direct result of the repeated failure of an agent of the government to provide correct information, and to follow

correct administrative procedures. 467 U.S. at 57. The Court identified respondent's inability to demonstrate that it had detrimentally relied on the government's misconduct as fatal to its claim. As in that case, Richmond's "detriment" is nothing more than "the inability to [ob]tain money that [he] should never have received in the first place." *Id.* at 61.

Both *Hansen* and *Community Health Services* observed that respondents had suffered no irreparable injury. In *Hansen*, "at worst, [the field representative's] conduct did not cause respondent to take action, . . . or fail to take action, . . . that respondent could not correct at any time." 450 U.S. at 789. And in *Community Health Services,* "respondent lost no rights but merely was induced to do something which could be corrected at a later time." 467 U.S. at 62. This is precisely Richmond's situation: his disability payments were fully restored when his pay fell below the statutory earnings threshold.

Until today, we followed those Supreme Court cases. In *Riggs* v. *Office of Personnel Management,* 709 F.2d 1486, 1488 (Fed. Cir. 1983), for example, we relied on *Hansen* and held that OPM's erroneous ruling, and Riggs' consequent failure to meet a statutory precondition to entitlement, did not estop the government from enforcing the precondition and denying Riggs benefits.

The cases the court believes support its departure from precedent do not. *National Corn Growers Ass'n* v. *Baker,* 840 F.2d 1547 (Fed. Cir. 1988), was restricted to the resolution of a jurisdictional issue, *id.* at 1550, and stands for nothing more than the unstartling proposition that "[t]he law is the law at the time of its existence, whether wrong or not, and 'practical men' have a right to rely on it at the time they perpetrate their actions." *Id.* at 1555. It says nothing about the quite different proposition ad-

vanced by the court today, that citizens are entitled to rely on what, in fact, is not the law.

In *USA Petroleum Corp. v. United States,* 821 F.2d 622 (Fed. Cir. 1987), the company was *contractually bound* to accept information provided by the government. In breach of its express and implied obligations to USA Petroleum, the government knowingly "foisted upon" the company incorrect data. *Id.* at 627. Recognizing the extraordinary exigency created by a situation in which a company "has no legal choice" but to accept the information provided by the government and to perform accordingly, we held that "[t]he equitable defense of estoppel is available to parties contracting with the government. . . . "*Id.* at 625. In contrast to this case, *USA Petroleum* follows the Supreme Court. *Hansen* acknowledges that a different analysis may be in order if "the Government had entered into written agreements which supported the claim of estoppel." 450 U.S. at 788 n.4.

In *Frantz v. Office of Personnel Management,* 778 F.2d 783 (Fed. Cir. 1985), equitable estoppel was neither argued nor discussed.

I am willing to assume, as did the Supreme Court, that violation of "some minimum standard of decency, honor, and reliability" might estop the government, 467 U.S. at 61, but this envisions at least some form of egregious misconduct. Ours is not that kind of case. I also agree that it is deplorable that government employees paid to guide citizens through the bureaucratic maze sometimes fail to perform their duties responsibly, assuming that here it was the Navy's responsibility to advise on OPM's behalf, which is not beyond question. But it is axiomatic that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services,* 467 U.S. at 63.

It seems to me that this is a particularly inappropriate case for making a chasm out of the crack the Supreme Court left open in *Community Health Services.* In section 8337(d) Congress set out a statutory definition of "earning capacity" of general applicability, eliminating the necessity of repeated particularized investigations. Regardless of why it happened, Richmond both met the statutory test of restored earning capacity and demonstrated that he was, in fact, restored to earning capacity. Section 8337 is a generous and salutary provision. But Congress certainly did not intend that beneficiaries gerrymand their earnings to get extra money from the taxpayers. Obviously the statute is susceptible of that abuse, but the court should not encourage it by the novel device of government estoppel in a case like this.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

Docket Number SF831L8710762

CHARLES R. RICHMOND, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, AGENCY
CSA 2 452 152

Date: October 14, 1987

Before: FRANCIS A. LEE, Administrative Judge.

INITIAL DECISION

INTRODUCTION

Appellant timely appealed the decision of the agency that found he was not entitled to disability annuity payments after June 30, 1987, because he had been restored to earning capacity. The appeal is within the Board's appellate jurisdiction. 5 U.S.C. § 8347(d).

For the reasons set forth below, the agency's decision is affirmed.

ANALYSIS AND FINDINGS

The agency discontinued appellant's disability annuity because his income during the calendar year 1986 exceeded 80% of his former base salary as a Welder, WG-10, Step 4.

Title 5 U.S.C. § 8337(d) provides that if an annuitant receiving a disability retirement annuity, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80% of the current rate of pay for the position occupied immediately before retirement.

The undisputed facts show that appellant retired from federal service on June 6, 1981. The base salary for a WG-10, Step 4, as of December 31, 1986, was $23,771. Eighty percent of $23,771 is $19,016.74. Appellant reported an income of $19,936 for 1986. Therefore, the undisputed facts show that appellant's income for 1986 exceeded the 80% limit set forth at 5 U.S.C. § 8337(d). Accordingly, the agency discontinued appellant's disability retirement on June 30, 1987, 180 days after the end of the calendar year 1986.

Nevertheless, appellant contends that his former employer, the Department of the Navy, misinformed him that the measuring period for income was 2 years rather than 1 year. Because of this information, appellant accepted additional hours of work with a school district as a bus driver. Appellant stated that his work as a bus driver is normally 5 hours each day, that this year his hours of work will be cut back to that figure, and that his average income for the previous 5 years was only about $12,494. He estimated his income for 1987 at approximately $15,000. Additionally, appellant testified that he received no notice from the agency, until May 12 of this year, that the correct measuring period is 1 year. In support of his

contention regarding the misinformation, appellant offered a copy of Federal Personnel Manual (FPM) Letter 831-64, Attachment 4, which he received from his former employer in January 1986, and which states that when in each of 2 consecutive years income from wages or self-employment equals at least 80% of the current rate of pay for the position retired from, earning capacity is deemed restored and the disability annuity is stopped.

Public Law 97-253, § 302(a)(1), effective December 31, 1982, amended 5 U.S.C. § 8337(d) by substituting 180 days for the 1 year provision relating to the restoration of an annuitant to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, and "any calendar year" for "each of 2 succeeding calendar years." Although it is undisputed that appellant's former employer, the Department of the Navy, gave appellant misinformation upon which he relied, that agency was not the Office of Personnel Management (OPM). Moreover, the OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility. *See Koch v. Office of Personnel Management*, 20 M.S.P.R. 461 (1984). This is true even if appellant did not receive notice from the OPM. Appellant's request for information was, unfortunately, directed to his former employer rather than the OPM, who administers the Civil Service Retirement System. Had appellant directed his request for information to the OPM, presumably, he would have learned of the change in the law. Since 5 U.S.C. § 8337(d) provides that earning *capacity* is the criterion for determining entitlement to a continuing disability retirement, and since appellant's earning capacity was demonstrated by his earning an income exceeding the 80% limitation, I find that he was restored to earning capacity in 1986, and, therefore, that he was not entitled to a continuation of that retirement annuity for that year.

DECISION

The agency's decision is AFFIRMED.

FOR THE BOARD: /s/ Francis A. Lee
FRANCIS A. LEE
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 18, 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructons are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If

you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C

United States Office of Personnel Management
Civil Service Retirement System
Washington, D.C. 20415

[May 12, 1987]

Claim Number: A24521520

CHARLES R. RICHMOND
3916 Cherry Blossom
National City, CA 92050

Restored to Earning Capacity

1. Date disability annuity stops: 06/30/87.

2. Rate of basic pay on Dec. 31, 1986 for position occupied immediately before retirement: $23,771.00.

3. Income reported for 1986: $19,936.00.

4. You will be eligible for deferred annuity which begins on: 10/21/11.

Under the Civil Service Retirement System, a disability annuitant who is under age 60 and earns, in any calendar year, at least 80 percent of the current rate of basic pay for the position occupied immediately before retirement is considered to be restored to earning capacity. Your reported income from wages and self-employment for the year shown in Block 3 was 80 percent or more of the current rate of basic pay for the position you occupied immediately before retirement. Therefore, you are considered to be restored to earning capacity and are no longer entitled to continue receiving a monthly disability annuity benefit, even though your medical condition may not have changed.

Your disability annuity will continue to the date shown in Block 1, which is 6 months from the end of the calendar year in which you are considered to be restored to earning capacity. If you are reemployed by the Federal Government before the date shown in Block 1, your disability annuity will stop on the date of reemployment. Tell us at once if you are reemployed before this date. If you are reemployed and your annuity continues, you will be indebted to the Civil Service Retirement System and we will bill you for the overpayment of annuity, plus interest and penalties that may be assessed.

You may be eligible based on your age and length of service for a deferred non-disability annuity beginning when you become age 62. About 60 days before you reach age 62, request OPM Form 1469A, "Application for Deferred Retirement," by calling (202) 632-7700 or writing to:

Office of Personnel Management
Civil Service Retirement System
Employee Service and Records Center
P.O. Box 45
Boyers, PA 16017

Effect on Other Benefits

If you are covered by Federal group life insurance, your coverage will end when your disability annuity stops. You are not eligible to convert your life insurance to an individual policy. If you are enrolled in Federal group health benefits, your enrollment will end when your disability annuity stops; you will then have 30 days in which to convert your coverage to an individual direct pay health insurance contract through the carrier of your group coverage.

Reinstatement of Your Disability Annuity

If, at some time in the future, you lose your earning capacity, you may qualify for reinstatement of your disability annuity. You will be eligible for reinstatement of your disability annuity (in the same amount you now receive) on the first of the year following any calendar year in which your income from wages and self-employment is less than 80% of the current rate of basic pay for the position from which you retired, unless you are: (a) reemployed for more than 1 year after having been found restored to earning capacity in a position under the Civil Service Retirement System (CSRS), (b) now working in a position under CSRS, or (c) recovered from the disability for which you retired. After reaching age 62 you will not be eligible to have your disability annuity reinstated, however you will be eligible for a deferred annuity as explained on page one of this notice.

If you are reemployed in a Federal Government position that is not under the Civil Service Retirement System, you can have your disability annuity reinstated but you cannot receive any payment of the reinstated benefit until that employment ends. Reinstatement of the disability annuity restores life insurance and health benefits coverages if you were enrolled in these programs on the date your disability annuity terminated.

If, in the future, you believe you meet the conditions for reinstatement of disability annuity, call (202) 632-7700 or write to:

Office of Personnel Management
Civil Service Retirement System
Employee Service and Records Center
P.O. Box 45
Boyers, PA 16017

We will inform you at that time what evidence is required from you to show your eligibility for reinstatement of retirement benefits.

Reemployment

As an employee retired for disability, you are entitled to placement assistance under the Displaced Employee Program. This right continues after your annuity is terminated for restoration to earning capacity. You must apply for such assistance by filing Standard Form 171 Personal Qualifications Statement, with your former employing agency. If you are unable to obtain guidance from your agency, you may file the form with the Office of Personnel Management area office closest to you. You may apply for placement assistance at any time up to 90 days after your disability annuity stops. You are eligible for placement under this program for up to two years after you register.

Reconsideration Right

You have the right to request reconsideration of our decision to stop your disability annuity.

If you wish to do this you must follow the procedures listed below, as provided for in the Office of Personnel Management (OPM) regulations (5 CFR, Part 831).

1. Make your request in writing and include your name, address, date of birth, claim number, and the reasons for your request.
2. If your request for reconsideration is based on a change in the amount of income reported, please include evidence such as an earnings statement (W2) or a copy of your income tax return which will verify the correct earnings amount.

3. Your request must be postmarked within 30 days from the date of this notice (date shown at the top of page 1). The time limit may be extended, however, if you can show that you were not notified of the time limit or were prevented from writing due to a cause beyond your control.
4. Send your request for reconsideration to:

   Office of Personnel Management
   Civil Service Retirement System
   Employee Service and Records Center
   P.O. Box 107
   Boyers, PA 16017

After reconsideration, OPM will send you a final decision in writing.

Sincerely,

Chief, Retirement Inspection Branch
Operations Support Division

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

[Filed Dec. 2, 1988]

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). SF831L8710762

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED AND REMANDED.

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: Dec. 2, 1988

ISSUED AS A MANDATE: February 10, 1989

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3243

CHARLES RICHMOND, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

[Filed: Feb. 3, 1989]

Before: NICHOLS, *Senior Judge,* MAYER and MICHEL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

February 3, 1989

cc: Charles Richmond
Robert A. Reutershan

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number SF831L8710762

CHARLES R. RICHMOND, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, AGENCY
CSA 2 452 152

[Date: Mar. 25, 1988]

Before: DANIEL R. LEVINSON, Chairman, MARIA L. JOHNSON, Vice Chairman.

ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on October 14, 1987, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the

petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD: /s/ William McCartney
for ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

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